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Federal Communications Commission
Washington, D.C. 20554

DISPATCHED BY

MM Docket No. 93-89

In re Applications of

AURIO A. MATOS File No. BPH-911114MS
ZLOYD SANTIAGO- File No. BPH-911115MP
SANTOS and
LOURDES RODRIGUEZ BONET

For Construction Permit for
New FM Station, Channel 293A.
Culebra, Puerto Rico

MEMORANDUM OPINION AND ORDER

Adopted: April 7, 1995;

Released: April 19, 1995

By the Review Board: MARINO (Chairman) and
GREENE.

1. The Review Board has before it a Joint Request for Approval of Settlement Agreement filed March 8, 1994 by Aurio A. Matos (Matos) and Lloyd Santiago-Santos and Lourdes Rodriguez-Bonet (Santiago & Rodriguez) as supplemented on July 22 and August 15, 1994 and amended on February 6 and 15, 1995. The Mass Media Bureau filed comments on April 28 and August 4, 1994 and February 24, 1995. Matos and Santiago & Rodriguez responded to the Bureau's comments on May 9 and August 22, 1994. Also before the Board are: a Statement for the Record filed January 28, 1994 by Matos; Mass Media Bureau's Motion to Reopen the Record and Enlarge Issues filed January 28, 1994, an opposition thereto filed February 7, 1994 by Matos, and a reply filed February 16, 1994 by the Bureau; Petitions for Leave to Amend filed February 7, April 14, May 5, and May 23, 1994 by Matos and comments thereon filed February 15 and June 2, 1994 by the Bureau; and Mass Media Bureau's Motion to Dismiss filed April 12, 1994.

2. By Memorandum Opinion and Order released October 11, 1994, the Review Board disapproved the settlement agreement as supplemented in 1994 because the consideration included consulting agreements with Santiago and Rodriguez without providing assurance that work would be done under the agreements and that the anticipated compensation would be appropriate for the anticipated work, the consultants' experience, and the time involved. *Aurio A. Matos*, 9 FCC Rcd 5764 (Rev. Bd. 1994). The settlement agreement provided for payment by Matos for Santiago & Rodriguez' reasonable and prudent expenses up to \$50,000, and the additional payment provided for by the consulting

agreements would have substantially exceeded the documented expenses. The parties' February 6, 1995 amendment specifically eliminates the consulting agreements from the settlement and limits the consideration to be paid by Matos to \$50,000, a sum represented to be less than the reasonable and prudent expenses incurred by Santiago & Rodriguez in preparing and prosecuting their application.¹ The settlement agreement as amended contemplates a grant of Matos' application and dismissal of the Santiago & Rodriguez application in exchange for the payment. No other consideration is promised or contemplated.

3. The Bureau argues that the reimbursement amount must be reduced by the amount reflected in an invoice for legal services from Isabel Rodriguez Bonet, Esq. because the invoice fails to describe the professional services rendered. (MMB's Further Com. on Jt. Req. for Approval of Settlement Agree. at 2 (Feb. 24, 1995).) This point was first made in the Bureau's comments filed August 4, 1994. The parties responded on August 22, 1994 and included a letter from Miss Rodriguez describing her services and how she computed her fee. (Letter from Rodriguez to Rasmussen of 8/10/94, Response to Comments of Mass Media Bureau, Exh. B (Aug. 22, 1994).) The Bureau raised no further objections. After reviewing the showing, the Board found that no questions remain about the reimbursable expenses under the settlement agreement. 9 FCC Rcd at 5764 ¶ 4. In their February 15, 1995 Further Amendment at Exh. B, the parties included a new invoice from Miss Rodriguez showing additional professional services and related expenses for documents prepared for the settlement agreement. The Bureau has raised no objection to this additional showing and we see no basis for disallowing these additional expenses.

4. In January 1994 the Bureau moved to reopen the record and add reporting (section 1.65) and transmitter site issues against Matos. Matos had proposed to use a site on a national wildlife refuge but was informed by the United States Department of Interior, Fish and Wildlife Service (FWS), in December 1993 that the site would not be available because of the proximity of the site to endangered sea turtles and plant species. (Letter from Davis to Matos of 12/13/93, MMB's Mot. to Reopen the R. and Enlarge Issues, Exh. 1 (Jan. 28, 1994).) The Bureau argues that, although Bureau counsel advised counsel for Matos of this letter on December 22, 1993, Matos failed to report this change with a timely amendment to his application. The Bureau does concede, however, that Matos served a copy of the letter on counsel for Santiago & Rodriguez on January 20, 1994 pursuant to a continuing document production request. (Mot. to Reopen at 2). This was accompanied by a letter from Matos' counsel explaining he had been delayed because he had been out of town for a family emergency. (Mot. to Reopen, Exh. 2).

5. Matos responded to the Bureau's motion by explaining he had quickly sought a new site after learning of the FWS decision not to grant a special use permit for using the existing tower. He obtained reasonable assurance of the site on January 3, 1994, completed the necessary engineering study by January 11, 1994, and filed a Petition for Leave to Amend with an amendment to the new site on February 7, 1994. (Declaration of Aurio A. Matos (2/6/94), Attach. to

¹ The February 15, 1995 amendment clarifies that the settlement agreement is contingent on grant of Matos' application as amended on February 7, 1994 to specify a new site and as

further amended on May 23, 1994 to conform the tower height to the height approved by the FAA.

Letter from Cinnamon to Caton of 3/7/94). He also argued that he was under no obligation to report after receiving the FWS letter because the letter was the equivalent of a predetermination letter under the procedures for the FWS. Matos had the right to oppose the letter and, if still unsatisfied, appeal further within the FWS before a determination would become final. See 50 C.F.R. §§ 25.45(b), (c), 29.22. Matos also said he had been advised by counsel that he might be able to co-locate his antenna on the existing tower without FWS permission because the tower was the personal property of Station WSAW and his proposal did not involve subletting any FWS land. Matos also argued that the Bureau failed to offer even speculation as to why he would intend to conceal information from the Commission that was known to the Bureau and that he had transmitted to the parties within thirty days of receiving it. Rather than delay service by litigating the Fish and Wildlife Service letter, Matos chose to pursue a different site. (Matos Opp. to Mot. to Reopen R. and Enlarge Issues (Feb. 7, 1994); Matos Pet. for Leave to Amend (Feb. 7, 1994).)

6. The Bureau responded that the amendment complied with all applicable technical requirements but pointed out that Matos had not received FAA approval. (MMB's Com. on Pet. for Leave to Amend at 2, 3 (Feb. 15, 1994).) This proved to be a problem and, on April 14, 1994, Matos advised the Commission that he intended to reduce his tower height at the FAA's request. (Pet. for Leave to Amend (Apr. 14, 1994).) He received an FAA Determination of No Hazard at the reduced height on May 4, 1994. (Pet. for Leave to Amend (May 5, 1994).) On May 23 he amended the technical portion of his application to be consistent with the height approved by the FAA. Pet. for Leave to Amend (May 23, 1994). The Bureau advised that this amended proposal complies with all applicable technical requirements. (MMB's Com. on Pet. for Leave to Amend (Jun. 2, 1994).)

7. Although interjecting no objection to Matos' amendment on technical grounds, the Bureau has not abandoned its argument that a reporting issue should be added against Matos for failing to amend its application with a copy of the Fish and Wildlife Service letter. (MMB's Further Com. on Jt. Req. for Approval of Settlement Agree. (Feb. 24, 1995).) We disagree. Even if Matos should be faulted for not amending his application, we see no evidence here of any deceptive intent which would turn this into disqualifying misconduct. Simply stated, there was no secret to keep. The Bureau had a copy of the letter, which Matos knew, and Matos served it on opposing parties. See *Rem Malloy Broadcasting*, 9 FCC Rcd 4822, 4826 ¶ 17 (Rev. Bd. 1994),² citing *Merrimack Valley Broadcasting, Inc.*, 99 FCC 2d 680, 683 n.9 (1984), *modifying criteria in* 55 RR 2d 23, 25 ¶ 3 (1983) (inquiry into reporting violation justified only when prima facie showing has been made of intent to conceal or significant carelessness regarding decisionally significant matter).

8. The Bureau also argues that Matos did not establish good cause for his amendment as required by 47 C.F.R. § 73.3522(b), and so, in spite of his amendment, does not have a site. (MMB's Com. on Pet. for Leave to Amend (Feb. 15, 1994).) The Bureau's reasoning is that the Fish and Wildlife Service ruling was foreseeable because Matos knew it had been trying to reduce or eliminate the tower

Matos initially proposed. The Bureau does not say when or how Matos would have learned this, and we are unaware of any statement to this effect from the FWS to Matos before the December FWS letter. Santiago & Rodriguez had attached to their exceptions a letter to their counsel from the Refuge Manager stating that Station WSAW cannot transfer its privileges under its special use permit, but this letter does not indicate that the FWS would not favorably consider an application from Matos. (Letter from Rice to Rasmussen of 7/16/93, Exceptions, Exh. 3.) Indeed, in a subsequent letter intended to dispel any impression that the FWS might have decided not to issue a special use permit to Matos, the Refuge Manager made clear that her earlier letter "did not discuss . . . whether the Fish and Wildlife Service (FWS) would or would not issue a Special Use Permit to [Matos]." Letter from Rice to Cerazo of Nov. 5, 1993, Reply Except. to I.D. of Aurio A. Matos, Exh. A (Dec. 20, 1993).) The Rice letter went on to explain that it is FWS policy not to make determinations on the merits of a request before it has the request in hand, and the time for seeking a special use permit would be after receiving an FCC license. Matos quickly applied for a permit after the presiding officer below issued an initial decision granting his application. When Matos received the response from the FWS denying his request, he quickly and reasonably elected to change his site rather than experience the delay involved in litigating over the FWS site. Until he received the FWS decision, he had permission from Station WSAW to use its tower and the expectation that the FWS would have no objection to the co-location of an antenna on an existing tower. See *Alden Communications Corp.*, 3 FCC Rcd 3937, 3938 ¶ 10 (1988), *aff'd by judgment*, 917 F.2d 62 (D.C. Cir. 1990). Matos' actions have not been unreasonable and do not defeat the good cause of his amendment.

9. With the acceptance of Matos' February 7, 1994 amendment to specify a new site, as modified by his May 23, 1994 amendment to conform to the tower height approved by the FAA, there is no impediment to granting approval of the settlement agreement as amended on February 6, 1995 and further amended on February 15, 1995. The parties' Joint Request for Approval of Settlement Agreement, as amended fully complies with the provisions of 47 U.S.C. § 311(c) and 47 C.F.R. § 73.3525 that govern settlement agreements. The parties have stated under penalty of perjury that there is no other consideration for dismissal of the Santiago & Rodriguez application other than the contemplated payment of the Santiago & Rodriguez expenses, they did not file their applications for the purpose of entering into a settlement agreement, and approval of the agreement would permit the early establishment of a new radio service in Culebra. Santiago & Rodriguez have further stated under penalty of perjury that the proposed payment is less than their legitimate and prudent expenses in prosecuting their application, and they have submitted supportive documentation showing that their expenses exceed the proposed \$50,000 expense reimbursement.

10. ACCORDINGLY, IT IS ORDERED That the Joint Request for Approval of Settlement Agreement, filed March 8, 1994 by Aurio A. Matos (Matos) and Lloyd Santiago-Santos and Lourdes Rodriguez-Bonet (Santiago & Rodriguez), as supplemented July 22, 1994 to show Santiago & Rodriguez' expenses, and as amended February

² Request for review dismissed, 10 FCC Rcd 503 (1995).

6, 1995 and further amended February 15, 1995 IS GRANTED, and the attached Settlement Agreement as amended August 16, 1994 (Exh. A to Response to Comments of Mass Media Bureau filed August 22, 1994 by Matos and Santiago & Rodriguez), February 6, 1995, and February 15, 1995 IS APPROVED; that the Supplement to Joint Request for Approval of Settlement Agreement filed August 15, 1994 by Matos and Santiago & Rodriguez IS REJECTED.

11. IT IS FURTHER ORDERED That the Mass Media Bureau's Motion to Reopen the Record and Enlarge the Issues filed January 28, 1994 IS DENIED; and that the Mass Media Bureau's Motion to Dismiss filed April 12, 1994 IS DISMISSED.

12. IT IS FURTHER ORDERED That the Petitions for Leave to Amend filed April 14 and May 5, 1995 by Matos ARE GRANTED; that the Petition for Leave to Amend filed February 7, 1994 as further amended by the Petition for Leave to Amend filed May 23, 1994 by Matos IS GRANTED, and the amendment as further amended IS ACCEPTED.

13. IT IS FURTHER ORDERED That the Statement in Support and Contingent Exceptions to Initial Decision of Aurio A. Matos filed December 3, 1994 and the Exceptions of Lloyd Santiago-Santos and Lourdes Rodriguez Bonet filed December 6, 1994 ARE DISMISSED; and that the Motion to Strike filed December 27, 1993 by Santiago & Rodriguez IS DISMISSED as moot.

14. IT IS FURTHER ORDERED That the application of Lloyd Santiago-Santos and Lourdes Rodriguez-Bonet (File No. BPH-911115MP) IS DISMISSED; that the application of Aurio A. Matos (File No. BPH-911114MS), as amended, IS GRANTED; and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board